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IN THE
Supreme Court of the United States

JONATHAN L. HAAS,
Petitioner,

v.

JAMES B. PEAKE, M.D., Secretary of Veterans Affairs,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF

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REPLY BRIEF

When adjudicating a claim for disability benefits, the Department of Veterans Affairs is required by statute to find service connection for specified diseases "manifest . . . in a veteran who, during active military, *naval*, or air service, *served in the Republic of Vietnam* during the period beginning on January 9, 1962 and ending on May 7, 1975." 38 U.S.C. § 1116(a)(1)(A) (emphasis added). Of the three diseases originally specified by the Agent Orange Act of 1991, one – non-Hodgkins lymphoma (NHL) – was included based on a finding of excess risk for that disease among blue-water navy veterans who served

off the coast of Vietnam. Pet. 8-11. From the inception of the Act, the Department gave the Act its plain meaning: if a veteran could prove that he performed military, naval or air service in the Republic of Vietnam in 1962 to 1975, any specified disease was deemed service-connected.

Faced with mounting claims as Congress added common diseases like Type 2 diabetes and lung and throat cancer to the list of covered diseases, Pet. 13-14, Pet. App. 162a-163a, the Department has switched course. It has now pronounced that when Congress granted service connection to veterans who served "in the Republic of Vietnam," it meant served in only *part* of the territory of that sovereign nation: its land mass and inland waterways. Pet. 11. Thus the Department imputes to Congress the intent to exclude from statutory protection the blue-water navy veterans who had the highest risk of the covered disease NHL, notwithstanding express legislative statements of the Act's sponsors that Congress intended to codify the NHL regulation granting them service connection, Pet. 11, and notwithstanding the widely recognized phenomenon of extensive wind drift of the chemical from the heavily sprayed coasts of Vietnam. Pet. 32.

In its brief in opposition, the Department offers no plausible defense of its unreasonable interpretation. It cannot make the requisite showing that "Republic of Vietnam" in ordinary meaning ever refers only to the perimeter of its land mass, a prerequisite to its assertion of statutory ambiguity. The Department

further ignores (and thus by its silence concedes) Petitioner's argument that its interpretation is inconsistent with the usage of the same term both in other parts of section 1116 and in the neighboring provisions of the Act. Pet. 23-25. Nor can it reconcile the Federal Circuit's failure to apply the pro-veteran canon with this Court's precedent, which declares that *Chevron* deference only comes into play "*after* applying the rule that interpretive doubt is resolved in favor of the veteran." *Brown v. Gardner*, 513 U.S. 115, 118 (1994) (emphasis added); Pet. 27-29.

The Department does not deny that the categorical exclusion of the approximately 832,000 blue-water navy veterans from the Act's protections is a matter of supreme importance to the nation's Vietnam veterans. Pet. 17-18. It does not contend that there is any vehicle problem with this case. Nor does the Department contest that if this petition is denied, many pending claims will be denied and irretrievably lost. Pet. 32-33. Indeed, a stay on the Department's denial of blue-water navy claims entered by the Court of Appeals for Veterans Claims recently expired. *Ribaudo v. Nicholson,* No. 06-2762, 2008 U.S. App. Vet. Claims LEXIS 1410 (Nov. 17, 20008). This Court should grant the petition to ensure fidelity to the intent of Congress and to this Court's precedents on this critical question.

1. The Department cannot escape the rule that an *undefined* statutory term – such as "Republic of Vietnam" – is intended to have its ordinary meaning. *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187

(1995). The ordinary meaning of a territorial reference to a sovereign nation necessarily encompasses that nation's territorial seas. Pet. 17-18. None of the Department's counterarguments is sound.

First, the Department asserts that "[t]he territory under a nation's jurisdiction may *include* the nation's land mass ..." Opp. 10 (emphasis added). Indisputably, the land mass of a nation is always included within its territorial jurisdiction, and – if the nation is landlocked – its land boundaries define its borders. But there is not a single authority that would support *limiting* the territory of a *coastal* nation – such as the Republic of Vietnam – to its land mass, and excluding the territorial seas. *Restatement (Second) of Foreign Relations Law* § 11 (1965) ("*Restatement*") (emphasis added); Pet. 18-19. To find ambiguity, there must be at a minimum "two plausible interpretations" of the statutory language in question. *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 419 (2005). No plausible interpretation of "Republic of Vietnam" limits that undefined term to the perimeter of its land mass.

Second, citing a treatise on the law of the sea governing marine resources, the Department contends that a nation's jurisdiction may in some circumstances extend beyond the territorial seas to include "the contiguous zone, continental shelf, and exclusive economic zone." Opp. 10. But "[a]mbiguity is a creature not of definitional possibilities but of

statutory context." *Brown*, 513 U.S. at 118. The Agent Orange Act has nothing to do with sovereignty over seabed resources, and Congress cannot plausibly have intended the term "Republic of Vietnam" to refer to a 200-mile exclusive economic zone around that country. Rather, that term identifies the territory in which the member had to be physically present during active service, and there is no ambiguity as to whether a naval veteran who served in the territorial seas of Vietnam performed "naval service" in the "Republic of Vietnam." Regardless, even if any of those concepts were plausible interpretations of the statutory term, they all include the territorial seas, and thus would not support the Department's position. Pet. 20-21.

Third, the Department points to statutes where Congress has extended benefits to veterans who served in waters "adjacent to" Vietnam or Mexico. Opp. 11. But "adjacent" waters is a term of art far broader than territorial seas, encompassing the entire theater of naval operations; in the Vietnam context, it has been defined to extend more than 100 miles offshore. Pet. 22-23. Congress's decision not to broaden coverage of the Act to include waters adjacent to the Republic of Vietnam does not divest the statute of its plain meaning as encompassing naval service within that nation's territory.

Fourth, the Department states baldly that "[t]here are a number of definitions, discussed in detail by the courts below, that define a nation's boundaries without respect to its territorial seas." Opp. 12. But

the Government fails to answer Petitioner's showing that none of the other sources cited by the courts below stands for that proposition. Pet. 11-13.

Finally, unable to make the requisite showing that the term "Republic of Vietnam" in its ordinary sense ever means only the land mass and inland waterways, the Department attempts to draw support from the specialized and inapposite context of immigration law. But even those arguments do not withstand scrutiny. The immigration statutes do not reflect idiosyncratic conceptions of what constitutes the territory of the "United States." Rather, they reflect longstanding interpretations whereby immigration rights that accrue to persons "within the United States" are not defined by territorial presence. *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 175 (1993); *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). Ignoring this distinction, the Department attempts to muster support from a Legal Counsel Opinion that aliens interdicted in territorial waters are not entitled to an exclusion hearing under the Immigration and Nationality Act (INA). Opp. 11-12. But the Legal Counsel "base[d] this conclusion primarily on the examination of the text of the statute – most importantly, its explicit requirements for exclusion proceedings" in INA sections 235 and 236. *Immigration Consequences of Undocumented Aliens' Arrival in United States Territorial Waters*, 17 U.S. Op. Off. Legal Counsel 77, 79 (1993). The opinion simply found that nothing in the INA's definition of "United States," which does not

expressly mention the territorial seas, "compels" a different construction of those provisions. *Id.*

Notably, the Department does not go so far as to contend that the term "United States" in the INA excludes the territorial waters. For example, the INS has interpreted the statutory grant of board-and-search powers to INS agents when "a reasonable distance from any external boundary of the United States," 8 U.S.C. § 1357(a)(3), to mean a reasonable distance from the limits of the territorial seas, 8 C.F.R. § 287.1(a)(1), and other provisions of the INA would make no sense if they did not apply to United States territorial waters. *See, e.g.*, 8 U.S.C. §§ 1284 (rules for retention of alien crewmen), 1323 (liability of vessels and their masters for bringing aliens into the United States).

2. Statutes are to be interpreted as a whole, not as isolated phrases. *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). The Department's construction is not only untenable as an interpretation of "Republic of Vietnam," but it is also irreconcilable with usage of the same term in other parts of section 1116, and in other sections of the 1991 Act. Pet. 23-25. If the Department's construction holds sway, Congress has required a veteran to prove the last day he actually set foot on the landmass of Vietnam to prove that his chloracne or porphyria cutanea tarda was timely manifested. *See* 38 U.S.C. § 1116(a)(2)(C),(E). The Department does not suggest that it ever required such proof, much less that Congress would reasonably have intended it. Nor

does the Department attempt to square its "boots-on-land" interpretation of section 1116 (originally section 2 of the Agent Orange Act of 1991, Pet. App. 138a-139a) with sections 3, 6, 7, and 8 of the Act (*id.* at 143a-155a). As the petition demonstrates, Congress used "service in the Republic of Vietnam" in its ordinary sense, not in the contorted sense the Department forwards here. Pet. 23a-24a. The Department's avoidance of these necessary steps of statutory interpretation betrays the poverty of its position.

3. The Department fares no better in addressing the legislative history. The Department urges that Congress engaged in a "close reading" of the two existing Dioxin Act regulations (chloracne and NHL); found that the former had a drastically narrower definition of the term service in Vietnam than the latter based on the placement of a comma; and codified the narrower version. Opp. 13-14.[1] Petitioner has demonstrated the error of that analysis, Pet. 25-27, but most fundamentally the Department's account is contradicted by the express declarations of the Act's sponsors that they were codifying both regulations (which are substantively identical despite the minor variance in punctuation). *Id.* at 11. The Department once again offers no explanation why Congress (acting in solicitude for

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[1] The Department incorrectly implies that the "duty or visitation" language adopted by regulation after the 1991 Act appeared only in the original Rule 311 (the chloracne regulation). Opp. 14. It also appeared in Rule 313 (the NHL regulation) as well. Pet. 8-9.

veterans) would eliminate for blue-water navy veterans the presumption of service connection for NHL that they enjoyed under the existing regulation, when that group was at the highest risk of contracting that disease. Congress did no such thing.

Nor does the Department marshal any evidence from the legislative history that Congress ever contemplated a "boots-on-land" requirement. Aerial chemicals are subject to wind drift. *See* Heping Zhu *et al.*, *DRIFTSIM: Predicting Drift Distances of Spray Droplets*, Ohio St. Univ. Extension, Bulletin 923 at 1-2, *available at* http://ohioline.osu.edu/b923/pdf/b923.pdf (last accessed Dec. 28, 2008). Agent Orange was blown far offshore by the heavy monsoonal winds that blow half the year. ROA560. Even the narrower service-connection rule proposed as an alternative by Admiral Zumwalt would have awarded service connection to anyone within twenty miles of a spray site – including naval veterans who served in the three-mile territorial seas off the heavily sprayed coasts. Pet. 32. But Congress rejected all such limitations in opting for a more inclusive remedy; it certainly did not categorically exclude blue-water navy veterans from the Act's protections.

4. Even if the statutory meaning were not so clear as it is, the question should have been resolved by application of the pro-veteran *Brown* rule.[2] The Department disagrees, favoring the rule adopted by

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[2] The Department apparently agrees with petitioner that this issue is properly presented to the Court. *See* Pet. 28-30.

the Federal Circuit below that "the canon that statutory ambiguities should be resolved in the veteran's favor comes into play only *after* the court has used all interpretive tools at its disposal, which of course includes principles of *Chevron* deference." Opp. 15. But that directly contradicts the rule announced by this Court in *Brown* that *Chevron* deference is granted only "*after* applying the rule that interpretive doubt is resolved in favor of the veteran." *Brown*, 513 U.S. at 118 (emphasis added]. The Department is correct that *Brown* found the statutory language at issue to be plain. Opp. 15. But the important point for certiorari purposes is that the Federal Circuit's rule runs directly afoul the rule stated by this Court.

Moreover, the Federal Circuit's rule is unsound. Congress is presumed to legislate with the understanding that any ambiguity will be interpreted in the veteran's favor. *King*, 502 U.S. at 220-21 n.9. This is a substantive rule of veteran's law, and agency deference only comes into play after "employing traditional tools of statutory construction." *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843 n.9 (1984). Indeed, *Chevron* deference is simply a general presumption of congressional intent when Congress delegates rulemaking authority to agencies, *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 740-41 (1996), and it is sensibly invoked only after canons specific to veterans law are applied.

The Department objects that fidelity to *Brown* "would largely eviscerate the VA's authority to apply its expertise and policy judgment to fill in gaps in the statutory scheme." Opp. 15. That is untrue; under the "modified" *Chevron* rule that formerly prevailed in the Federal Circuit, the *Brown* rule was employed on pure questions of statutory interpretation (interpretive rules), and the agency was granted deference on gap-filling substantive rules. Pet. 28. By contrast, the new Federal Circuit rule wholly eliminates the *Brown* rule whenever the Department has addressed the issue in a regulation, adjudication, or other ruling with the force of law (which are effectively the only Departmental orders that come before the Federal Circuit in its limited jurisdiction, *see* 38 U.S.C. § 7292). Veterans statutes are supposed to be interpreted in favor of veterans out of gratitude to those "who left private life to serve their country in its hour of great need." *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946). Congress did not elevate principles of agency expertise over solicitude for disabled veterans.

The Department renews the Federal Circuit's remarkable claim that in any event "the Secretary already has interpreted the statute in the veterans' favor by applying the presumption to any veteran who set foot on the land mass of Vietnam, however briefly," and to those who traversed inland waterways. Opp. 16 & n.3. The Department confuses two discrete issues: whether Congress could have drawn a narrower standard, and whether the

statutory phrase "veteran who, during active military, naval, or air service, served in the Republic of Vietnam," 38 U.S.C. § 1116(a)(1)(A), is susceptible to a narrower interpretation than the Department gave. Only the latter is relevant. The Department cannot claim that it favored veterans by not imposing duration-based limits on service, because the statute does not authorize any such restriction. And even the Department does not contend that the territorial term "Republic of Vietnam" can be interpreted to exclude inland waters. It is impossible to construe section 1116 more narrowly than the Department did.

The relationship of *Brown* and *Chevron* is a critical issue that affects all veterans benefits cases. The importance of this conflict, together with the inherent importance of the coverage of the Agent Orange Act, makes this Court's review imperative.

5. Finally, the Department misapprehends petitioner's argument on the unreasonableness of its interpretation. The interpretation of whether a veteran "served in the Republic of Vietnam" from 1962 to 1975 is a question of historical fact, and does not depend on the Department's evaluation of current scientific evidence. Moreover, the Department is not drawing its categorical lines based on scientific evidence establishing relative levels of exposure or disease rates among those who served in coastal waters or on land. It is simply *presuming* that those who served at sea had materially different exposure, despite plausible channels of indirect exposure through spray drift and water contamination.

Pet. 7 & n.1. But Congress chose not to draw any lines whatsoever among Vietnam veterans, precisely because evidence of exposure and causation was practically unavailable (which is why the Department's contention that blue-water navy veterans should be put to that proof is no answer at all). Congress believed that full coverage was a better course than excluding exposed veterans who could not prove service connection.

CONCLUSION

The Department and the Federal Circuit have decided a question of critical importance to the nation's veterans in conflict with the principles that this Court has declared applicable to veterans cases. For the reasons stated above and in the petition, this Court should grant review.

Respectfully submitted,

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